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Your reference:

Our reference: SUB/295/2009

11 June 2009

Dear William

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

As the Minister with responsibility for local government, I am writing to advise that, in accordance with Standing Order 30(1), I am submitting the full text of the Local Government (Miscellaneous Provisions) Bill.

The Executive considered the Bill at its meeting on 11 June 2009 and was content.

In addition please also find attached:

- (1) the Explanatory and Financial Memorandum; and
- (2) a statement on the legislative competence of the Assembly in relation to the Bill (as required by Section 9 of the Northern Ireland Act 1998) and cleared with Departmental Solicitor's Office.

It is proposed that the Bill will be introduced to the Assembly on 22 June 2009.

Yours sincerely

SAMMY WILSON MP MLA
Minister of the Environment

Local Government (Miscellaneous Provisions) Bill

[26/05/2009 16:43:03]

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TO

Make provision about the powers of district councils to enter into contracts and to acquire land otherwise than by agreement; to make provision in connection with the re-organisation of local government, including provision for controls on existing councils, for statutory transition committees and for the payment of severance allowances to councillors; and for connected purposes.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

PART 1

CONTRACTS OF COUNCILS

Contracts for provision of assets or services

Functions to include power to enter contracts [j1]

1.—(1) Every statutory provision conferring or imposing a function on a district council confers power on the district council to enter into a contract with another person for the provision or making available of assets or services, or both, for the purposes of, or in connection with, the discharge of the function by the district council.

(2) Where—

- (a) a district council enters into a contract such as is mentioned in subsection (1) (“the provision contract”) under any statutory provision, and
- (b) in connection with the provision contract, a person (“the financier”) makes a loan to, or provides any other form of finance for, a party to the provision contract other than the district council,

the statutory provision also confers power on the district council to enter into a contract with the financier, or any insurer of or trustee for the financier, in connection with the provision contract.

(3) This Part applies to any contract which a district council enters into after 22nd June 2009.

Certified contracts

Certified contracts to be intra vires [j2]

2.—(1) Where a district council has entered into a contract, the contract shall, if it is a certified contract, have effect (and be deemed always to have had effect) as if the district council had had power to enter into it (and had exercised that power properly in entering into it).

(2) For the purposes of this Part a contract entered into by a district council is a certified contract if (and, subject to subsections (3) and (4), only if) the certification requirements have been satisfied by the district council with respect to the contract and they were so satisfied before the end of the certification period.

(3) A contract entered into by a district council shall be treated as a certified contract during the certification period if the contract provides that the certification requirements are intended to be satisfied by the district council with respect to the contract before the end of that period.

(4) Where a district council has entered into a contract which is a certified contract (“the existing contract”) and the existing contract is replaced by a contract entered into by it with a person or persons not identical with the person or persons with whom it entered into the existing contract, the replacement contract is also a certified contract if—

- (a) the period for which it operates or is intended to operate ends at the same time as the period for which the existing contract was to operate, and
- (b) apart from that, its provisions are the same as those of the existing contract.

(5) In this Part “the certification period”, in relation to a contract entered into by a district council, means—

- (a) in the case of a contract entered into before the day on which this section comes into operation, the period of 6 weeks beginning with that day;
- (b) in every other case, the period of 6 weeks beginning with the day on which the district council entered into the contract.

(6) Subsection (1) is subject to section 5 (special provisions about judicial reviews and audit reviews).

(7) The application of subsection (1) in relation to a contract entered into by a district council does not affect any claim for damages made by a person who is not (and has never been) a party to the contract in respect of a breach by the district council of any duty to do, or not to do, something before entering into the contract, including, in particular, any such duty imposed by—

- (a) a statutory provision for giving effect to any Community obligation relating to public procurement; or
- (b) Article 19(1) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992 (NI 6).

The certification requirements [j3]

3.—(1) In this Part “the certification requirements”, in relation to a contract entered into by a district council, means the requirements specified in subsections (2) to (4).

(2) The requirement specified in this subsection is that the district council must have issued a certificate (whether before or after the contract is entered into)—

- (a) including details of the period for which the contract operates or is to operate;
- (b) describing the purpose of the contract;
- (c) containing a statement that the contract is or is to be a contract falling within subsection (5) or (6);
- (d) stating that the district council had or has power to enter into the contract and specifying the statutory provision, or each of the statutory provisions, conferring the power;
- (e) stating that a copy of the certificate has been or is to be given to each person to whom a copy is required to be given by regulations;
- (f) dealing in the prescribed manner with any matters required by regulations to be dealt with in certificates under this section; and
- (g) confirming that the district council has complied with or is to comply with any requirement imposed by regulations with respect to the issue of certificates under this section.

(3) The requirement specified in this subsection is that the district council must have secured that the certificate is signed by any person who is required by regulations to sign it.

(4) The requirement specified in this subsection is that the district council must have obtained consent to the issue of a certificate under this section from each of the persons with whom the district council has entered, or is to enter, into the contract.

(5) A contract entered into by a district council falls within this subsection if—

- (a) it is entered into with another person for the provision or making available of services (whether or not together with assets) for the purposes of, or in connection with, the discharge by the district council of any of its functions; and
- (b) it operates, or is intended to operate, for a period of at least 5 years.

(6) A contract entered into by a district council falls within this subsection if it is entered into, in connection with a contract falling within subsection (5), with—

- (a) a person who, in connection with that contract, makes a loan to, or provides any other form of finance for, a party to that contract other than the district council; or
- (b) any insurer of or trustee for such a person.

(7) The Department may by regulations amend subsection (5) or (6).

PART 1

Certified contracts: supplementary [j4]

4.—(1) This section applies where the certification requirements have been satisfied by a district council.

(2) The certificate which has been issued shall have effect (and be deemed always to have had effect) as if the district council had had power to issue it (and had exercised that power properly in issuing it); and a certificate which has been so issued is not invalidated by reason that anything in the certificate is inaccurate or untrue.

(3) The district council shall secure that throughout the period for which the contract operates—

- (a) a copy of the certificate which has been issued is open to inspection by members of the public at all reasonable times without payment; and
- (b) members of the public are afforded facilities for obtaining copies of that certificate on payment of a reasonable fee.

Special provision for judicial reviews and audit reviews [j5]

5.—(1) Section 2(1) does not apply for the purposes of determining any question arising on—

- (a) an application for judicial review, or
- (b) an audit review,

as to whether a district council had power to enter into a contract (or exercised any power properly in entering into a contract).

(2) Section 2(1) has effect subject to any determination or order made in relation to a certified contract on—

- (a) an application for judicial review, or
- (b) an audit review.

(3) Where, on an application for judicial review or an audit review relating to a certified contract entered into by a district council, a court—

- (a) is of the opinion that the district council did not have power to enter into the contract (or exercised any power improperly in entering into it), but
- (b) (having regard in particular to the likely consequences for the financial position of the district council, and for the provision of services to the public, of a decision that the contract should not have effect) considers that the contract should have effect,

the court may determine that the contract has (and always has had) effect as if the district council had had power to enter into it (and had exercised that power properly in entering into it).

(4) In this section and sections 6 and 7 references to an application for judicial review include any appeal (or further appeal) against a determination or order made on such an application.

Relevant discharge terms [j6]

6.—(1) No determination or order made in relation to a certified contract on—

- (a) an application for judicial review, or

- (b) an audit review,

shall affect the enforceability of any relevant discharge terms relating to the contract.

(2) In this section and section 7 “relevant discharge terms”, in relation to a contract entered into by a district council, means terms—

- (a) which have been agreed by the district council and any person with whom the district council entered into the contract;
- (b) which either form part of the contract or constitute or form part of another agreement entered into by them not later than the day on which the contract was entered into; and
- (c) which provide for a consequence mentioned in subsection (3) to ensue in the event of the making of a determination or order in relation to the contract on an application for judicial review or an audit review.

(3) Those consequences are—

- (a) the payment of compensatory damages (measured by reference to loss incurred or loss of profits or to any other circumstances) by one of the parties to the other;
- (b) the adjustment between the parties of rights and liabilities relating to any assets provided or made available under the contract; or
- (c) both of those things.

(4) Where a district council has agreed relevant discharge terms with any person with whom it has entered into a contract and the contract is a certified contract, the relevant discharge terms shall have effect (and be deemed always to have had effect) as if the district council had had power to agree them (and had exercised that power properly in agreeing them).

Absence of relevant discharge terms [j7]

7.—(1) Subsection (2) applies where—

- (a) the result of a determination or order made by a court on an application for judicial review or an audit review is that a certified contract does not have effect; and
- (b) there are no relevant discharge terms having effect between the district council and a person who is a party to the contract.

(2) That person shall be entitled to be paid by the district council such sums (if any) as that person would have been entitled to be paid by the district council if the contract—

- (a) had had effect until the time when the determination or order was made; but
- (b) had been terminated at that time by acceptance by that person of a repudiatory breach by the district council.

(3) For the purposes of this section the circumstances in which there are no relevant discharge terms having effect between the district council and a person who is a party to the contract include (as well as circumstances in which no such terms have been agreed) circumstances in which the result of a determination or

PART 1

order of a court, made (despite section 6(4)) on an application for judicial review or an audit review, is that such terms do not have effect.

Interpretation of this Part [j10]

8. In this Part—

“an audit review” means—

- (a) an application or appeal under Article 19 of the Local Government (Northern Ireland) Order 2005 (NI 18) (application by auditor, or appeal by person objecting to accounts, for declaration as to unlawful item of account);
- (b) consideration by an auditor of whether to give a certificate under Article 20 of that Order (certificate about sum not accounted for or loss or deficiency caused by wilful misconduct) or an appeal under that Article; or
- (c) any appeal (or further appeal) against a decision made on an application referred to in paragraph (a) or on an appeal referred to in paragraph (a) or (b);

“the certification period” has the meaning given by section 2(5);

“the certification requirements” has the meaning given by section 3(1).

PART 2

LOCAL GOVERNMENT REORGANISATION

CHAPTER 1

INTRODUCTORY

Introductory [j0730]

9.—(1) In this Part—

“existing council” means a district council constituted under section 1 of the Local Government Act (Northern Ireland) 1972 (c. 9) as in force on the date on which this section comes into operation;

“new council” means a district council to be constituted under that section as amended by section 3(1) of the Local Government (Boundaries) Act (Northern Ireland) 2008 (c. 7).

(2) For the purposes of this Part—

- (a) “successor council”, in relation to an existing council, means the new council whose district is, in accordance with section 1 of the Local Government (Boundaries) Act (Northern Ireland) 2008, to incorporate the whole or the major part of the district of the existing council; and
- (b) in relation to a new council, an existing council is a “predecessor council” if the whole or the major part of the district of the existing council is, in accordance with that section, to be incorporated in the district of the new council.

CHAPTER 2

CONTROL OF DISPOSALS AND CONTRACTS OF EXISTING COUNCILS

Control of disposals and contracts of existing councils [j0724]

10.—(1) The Department may direct that, with effect from a specified date, an existing council shall not, without the written consent of a specified statutory transition committee—

- (a) dispose of any land if the consideration for the disposal exceeds a specified sum;
- (b) enter into any capital contract—
 - (i) under which the consideration payable by the council exceeds a specified sum; or
 - (ii) which includes a term allowing the consideration payable by the council to be varied;
- (c) enter into any non-capital contract under which the consideration payable by the council exceeds a specified sum, where—
 - (i) the period of the contract extends beyond a specified date; or
 - (ii) under the terms of the contract, that period may be extended beyond that date.

(2) In subsection (1)—

“capital contract” means a contract as regards which the consideration payable by the council is capital expenditure;

“capital expenditure” means expenditure which falls to be capitalised in accordance with proper practices (within the meaning of Article 6(3) of the Local Government (Northern Ireland) Order 2005 (NI 18));

“non-capital contract” means a contract which is not a capital contract.

(3) A direction under subsection (1)(b) or (c) may provide that the consent of a specified statutory transition committee is not required in relation to a contract of a specified description.

(4) A direction—

- (a) shall be in writing;
- (b) may make different provision in relation to different matters for which consent is required;
- (c) may be varied or revoked by a subsequent direction.

(5) In this Chapter—

“direction” means a direction under this section;

“specified”, in relation to a direction, means specified in the direction;

“statutory transition committee” means a committee established under section 14.

(6) References in this Chapter to disposing of land include references to—

- (a) dealing with land in any way mentioned in section 45(3) of the Interpretation Act (Northern Ireland) 1954 (c. 33);

- (b) entering into a contract to dispose of land;
- (c) granting an option to acquire land.

Directions: supplementary [j0726]

11.—(1) A consent for the purposes of a direction may be given—

- (a) in respect of a particular disposal or contract, or in respect of disposals or contracts of any description;
- (b) unconditionally or subject to conditions.

(2) The consent required by a direction is in addition to any consent required by any other statutory provision.

(3) Where the consideration or any of the consideration under a contract is not in money, the limits specified in a direction by virtue of section 10(1)(a) to (c) apply to the value of the consideration.

(4) Where—

- (a) a question arises in relation to a direction as to the value of any consideration, and
- (b) the existing council concerned and the specified statutory transition committee fail to reach agreement,

the value is to be determined by the Department.

Consideration to be taken into account for purposes of direction [j0727]

12.—(1) In determining whether the limit specified by virtue of section 10(1)(a) is exceeded in the case of a disposal of land by an existing council, the consideration with respect to any other disposal of land made by the council after a specified date is to be taken into account.

(2) In determining whether the limit specified by virtue of section 10(1)(b) or (c) is exceeded in the case of a contract entered into by an existing council (“the contract in question”), the consideration payable by the council under any other relevant contract shall be taken into account.

(3) For the purposes of subsection (2) a “relevant contract” means a contract which is either or both—

- (a) a contract entered into after a specified date by the council and the person with whom the contract in question is entered into;
- (b) a contract entered into after that date by the council which relates to the same or a similar description of matter as that to which the contract in question relates.

Contravention of direction [j0728]

13.—(1) A disposal made in contravention of a direction is void.

(2) A contract entered into by an existing council in contravention of a direction is not enforceable against a successor council.

(3) A contract which apart from this subsection would be a certified contract for the purposes of Part 1 is not a certified contract for those purposes if it is entered into in contravention of a direction.

CHAPTER 3

STATUTORY TRANSITION COMMITTEES

Statutory transition committees: constitution [j2tc]

14.—(1) In relation to each new council there shall be a body called a statutory transition committee.

(2) A statutory transition committee shall be a body corporate to which, subject to the provisions of this Chapter, section 19 of the Interpretation Act (Northern Ireland) 1954 (c. 33) shall apply.

(3) The Department shall by regulations provide for the establishment of statutory transition committees.

(4) Those regulations shall ensure that the statutory transition committee in relation to a new council consists of members of the predecessor council or councils.

(5) Those regulations may make provision as to—

- (a) the appointment of the Chair and other members of a statutory transition committee (including the number of members to be appointed from each predecessor council and any conditions to be fulfilled for appointment);
- (b) the tenure of office of the Chair and other members (including the circumstances in which they cease to hold office or may be removed or suspended from office).

(6) Regulations may make provision for, or in connection with—

- (a) the procedure to be followed by statutory transition committees;
- (b) the payment of allowances to members of statutory transition committees;
- (c) the making available to statutory transition committees of the facilities, staff and premises of existing councils;
- (d) such other matters in connection with the efficient and effective discharge by statutory transition committees of their functions as the Department thinks appropriate.

(7) The Department may make payments to statutory transition committees on such terms and conditions as the Department may determine.

(8) Except to the extent to which regulations otherwise provide, a statutory transition committee—

- (a) is a local government body for the purposes of Part 2 of the Local Government (Northern Ireland) Order 2005 (NI 18); but
- (b) is not to be treated as a joint committee of any existing councils.

Statutory transition committees: functions [j3tc]

15.—(1) The functions of a statutory transition committee are exercisable for the purpose of preparing for, and giving full effect to, the reorganisation of local government provided for by the Local Government (Boundaries) Act (Northern Ireland) 2008 and, in particular for facilitating—

- (a) the exercise of their functions by new councils as from their initial constitution; and

- (2) The regulations may include provision as to—
- (a) the amounts of severance payments and the methods of calculating those amounts;
 - (b) the procedure for applying for severance payments and for dealing with such applications.
- (3) In section 4(1) (disqualifications for being elected, or being, a councillor) of the Local Government Act (Northern Ireland) 1972 (c. 9), after paragraph (e) add—
- “(f) he has received a severance payment (within the meaning of section 17 of the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2009).”.

PART 3

MISCELLANEOUS AND SUPPLEMENTARY

Acquisition of land otherwise than by agreement

Acquisition of land otherwise than by agreement [j9]

18. A district council may acquire land otherwise than by agreement for the purposes of Part 2 of the Waste and Contaminated Land (Northern Ireland) Order 1997 (NI 19).

Joint committees

Application of certain provisions to certain joint committees constituted as bodies corporate [j20]

19.—(1) In the Local Government (Constituting a Joint Committee a Body Corporate) Order (Northern Ireland) 2004 (No. 49) after Article 6 insert—

“6A. The following provisions of the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2009 shall apply to arc21 as they apply to a council—

- (a) Part 1 (contracts); and
- (b) section 18 (acquisition of land otherwise than by agreement).”.

(2) In the Local Government (Constituting a Joint Committee a Body Corporate) Order (Northern Ireland) 2008 (No. 310) after Article 6 insert—

“6A. The following provisions of the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2009 shall apply to SWaMP2008 as they apply to a council—

- (a) Part 1 (contracts); and
- (b) section 18 (acquisition of land otherwise than by agreement).”.

(3) This section does not affect any power to amend or revoke the orders mentioned in subsection (1) and (2).

Supplementary

Regulations and orders [j11]

20.—(1) No regulations shall be made under—

- (a) section 3(7), or
- (b) Chapter 3 of Part 2,

unless a draft of the regulations has been laid before, and approved by a resolution of, the Assembly.

(2) Any other regulations under this Act shall be subject to negative resolution.

(3) Regulations and orders under this Act may contain such incidental, supplementary, consequential, transitory or saving provisions as the Department thinks necessary or expedient.

Interpretation of this Act [j10a]

21. In this Act—

“the Department” means the Department of the Environment;

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the Department;

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954 (c. 33).

Commencement [j13]

22.—(1) The following provisions come into operation on the day after the day on which this Act receives Royal Assent—

- (a) section 3 insofar as it confers power to make regulations;
- (b) Part 2; and
- (c) this Part.

(2) The other provisions of this Act come into operation on such day or days as the Department may by order appoint.

Short title [j12]

23. This Act may be cited as the Local Government (Miscellaneous Provisions) Act (Northern Ireland) 2009.

This Memorandum refers to the Local Government (Miscellaneous Provisions) Bill as introduced in the Northern Ireland Assembly on [Bill Office will insert date], (Bill [Bill Office will insert No.] 2009)

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department of the Environment in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The EC Landfill Directive (1999/31/EC) aims to prevent or reduce, so far as possible, negative effects on the environment from the landfilling of waste. The Directive requires Member States to meet recycling targets from 2010 through to 2020 and reduce the volume of biodegradable waste being sent to landfill.
4. District councils are responsible for the collection and disposal of waste and it is imperative that they meet the Landfill Directive targets to avoid possible infraction proceedings. To do so will require the construction of significant new waste facilities (e.g. Mechanical Biological Treatment plants, Energy from Waste facilities and other recycling measures). One of the options under consideration by councils involves the private sector building the facilities and providing recycling services to councils by means of Public Private Partnership (PPP)/Private Finance Initiative (PFI) contracts. At present, however, there are some doubts about the powers of councils to enter into such contracts.
5. The Bill aims to clarify the powers of district councils to enter into long-term service contracts with the private sector and so remove any concerns contractors and financiers might have about such contracts. The proposed legislation needs to

This Memorandum refers to the Local Government (Miscellaneous Provisions) Bill as introduced in the Northern Ireland Assembly on [Bill Office will insert date], (Bill [Bill Office will insert No.] 2009)

be in place as soon as possible so that the necessary contracts can be awarded and the infrastructure provided in time to meet the Landfill Directive targets.

6. The Bill will also enable councils to acquire land otherwise than by agreement (i.e. to vest land) for waste management purposes.
7. The Bill will make preliminary arrangements for the reorganisation of local government. It will introduce controls on specified financial activities by the current 26 district councils in the period leading up to their dissolution and the establishment of the 11 new district councils as part of the reorganisation of local government. The aim is to ensure that the new councils are not constrained by being bound to long-term financial commitments entered into on their behalf by the current councils. The Bill will give the Department powers enabling it to introduce the system of controls by direction.
8. The Bill will establish statutory transition committees for the purpose of preparing for, and giving full effect to, the reorganisation of local government.
9. The Bill will enable the Department to make regulations to provide for severance payments to be made to councillors who resign during a specified period.

CONSULTATION

10. In 2005, the Department established a Waste Infrastructure Task Force – a partnership between central and local government – to elicit the views of key stakeholders on proposals for delivering a new waste infrastructure for Northern Ireland. Those stakeholders were generally in agreement with the Department’s proposals.
11. The Department also carried out a formal consultation exercise with interested parties on its contracts and compulsory purchase proposals over a 3-month period between December 2008 and March 2009. While the 14 respondents who commented generally welcomed the Bill and were supportive of the Department’s proposals, 7 mentioned that it did not cover all of the legislative issues that would arise in the waste infrastructure procurement process. The Department proposes to address those issues in subsequent legislation.
12. There has been no formal consultation on control of disposals, etc. by existing councils; however, the Local Government Taskforce Finance Sub-group, which submitted its final report to the Taskforce in July 2006, flagged this up as an issue to be addressed. Membership of the sub-group included elected members and officers from local government and officials from central government.

This Memorandum refers to the Local Government (Miscellaneous Provisions) Bill as introduced in the Northern Ireland Assembly on [Bill Office will insert date], (Bill [Bill Office will insert No.] 2009)

13. Proposals in relation to the composition, governance arrangements and functions of the statutory transition committees were developed through the Strategic Leadership Board, chaired by the Minister, and including elected representatives from the five main political parties. A formal consultation exercise was carried out from 6 April to 31 May 2009 on the composition, role and governance arrangements for statutory transition committees. The consultation will largely inform the subsequent subordinate legislation.
14. Severance arrangements for councillors was one of the areas considered by the Councillors' Remuneration Working Group which reported in June 2006. Membership of the Group included representatives of the Northern Ireland Local Government Association, the National Association of Councillors, the business sector, the voluntary sector, trade unions, the Department and an independent. The report was issued to councils and local government representative bodies for comment. A formal consultation exercise was carried out from 6 April to 31 May 2009. The consultation will largely inform the detail of the severance scheme which will be set out in regulations.

OPTIONS CONSIDERED

15. There is a lack of private sector confidence concerning the powers of councils to enter into long-term service contracts. To do nothing would run the risk of EC Landfill Directive targets not being met and possible infraction proceedings. The Department is therefore proposing to clarify the contractual powers of councils in the Bill so that contractors are encouraged to compete for contracts for the construction of the necessary waste infrastructure in Northern Ireland.
16. Consideration was given to whether it would be prudent to introduce a system of controls on existing councils in the run up to reorganisation. It was concluded that such an approach would be desirable to ensure that the new councils would not be bound into long-term and significant financial commitments over which they have no control. Consideration was also given to a wider range of controls, but the conclusion reached was that this would be too restrictive, and that controls should apply only to disposals of land and contracts in excess of specified thresholds, with additional scope for exemptions in certain cases.
17. Consideration was given to whether the new councils should operate in shadow form for a period after the 2011 elections before assuming full powers and responsibilities. The public will, however, expect to see modern, effective public services in place as soon as possible. It was therefore decided that statutory transition committees should be established and be responsible for a significant programme of work in the run up to the elections to ensure that the new councils will be in a position to take full executive control for services from the outset.

This Memorandum refers to the Local Government (Miscellaneous Provisions) Bill as introduced in the Northern Ireland Assembly on [Bill Office will insert date], (Bill [Bill Office will insert No.] 2009)

18. Following an Executive meeting on the Review of Public Administration in relation to local government, the then Minister of the Environment, Arlene Foster, announced, on 31 March 2008, that she would introduce a severance scheme in order to recognise the contribution of long-standing councillors who opt not to stand for re-election. No other options were considered.

OVERVIEW

19. The Bill has 23 clauses and comprises 3 Parts. Part 1 contains 8 clauses concerning contracts of councils; Part 2 contains 9 clauses concerning local government reorganisation matters (control of disposals, etc. by existing councils, transition committees and severance payments to councillors); and Part 3 contains 6 clauses on miscellaneous and supplementary matters.

COMMENTARY ON CLAUSES

20. A commentary on the provisions follows below. Comments are not given where the wording is self-explanatory.

Clause 1: Functions to include power to enter contracts

This clause clarifies the power of councils to enter into contracts for the provision of assets or services (or both) for the purpose of discharging any of their functions. Although this provision will enable councils to enter into PPP/PFI type contracts, it is not restricted to such contracts. The clause also enables councils to enter into separate or collateral contracts with the financiers, or insurers of or trustees for the financiers, of the contracts. This will give a third party, who provided finance to a contractor, “step-in” rights in the event that the contractor produces an unacceptably poor performance, becomes insolvent or is otherwise unable to honour the contract.

Clause 2: Certified contracts to be intra vires

This clause is the first of a two-staged approach providing “safe harbour” protection from legal challenge to private sector contractors and their financiers. It does so by introducing a presumption that a certified contract is legal for private law purposes. The clause provides that, even if a council had no power at all to enter into a contract or had abused a power it did have, a certified contract is presumed to be legal unless it is successfully challenged by means of a public law review (i.e. by judicial or audit review).

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Clauses 3: The certification requirements

This clause sets out the certification requirements a council must satisfy for a contract to be a certified contract. One of the requirements is that the contract will operate, or is intended to operate, for a period of at least five years. The clause also provides that the Department may make regulations concerning certain certification requirements.

Clause 4: Certified contracts: supplementary

This clause provides that, where a council has satisfied the certification requirements in respect of a certified contract, the certificate that is issued will have effect and is not invalidated by anything in the certificate which is inaccurate or untrue.

Clause 5: Special provision for judicial reviews and audit reviews

While clause 2 introduces the presumption that a certified contract is lawful, this clause preserves the right to challenge the lawfulness of such a contract. Such a challenge is restricted to public law challenge by means of judicial review or audit review. Clause 5 also provides the second stage in giving “safe harbour” protection to private sector contractors and their financiers. It does so by providing that where, on public challenge, a court takes the view that a certified contract is unlawful (because the council did not have the power to enter into the contract or had exercised any power improperly), the court may nevertheless decide that the contract can continue to have effect. In reaching such a decision, the court may take into account a number of factors, in particular the likely consequences for the financial position of the council and the provision of services to the public if a decision were made that the contract should not have effect.

Clauses 6 and 7: Relevant discharge terms and Absence of relevant discharge terms

These clauses provide for special terms (i.e. relevant discharge terms) of a certified contract, whether the main or collateral contract, which come into play in the event that a court finds the contract to be unlawful and that it should be set aside. Clause 6 provides for terms to be agreed between the parties for this eventuality and clause 7 provides for the situation where no discharge terms have been agreed or where the court finds that such terms are unenforceable.

Clause 10: Control of disposals and contracts of existing councils

This clause sets out a system of controls on disposals of land, and capital and non-capital contracts being entered into, by the current 26 district councils in the period leading up to their dissolution and the establishment of the 11 new district councils. The Department will have powers to direct that councils must obtain consent from their statutory transition committees before engaging in the specified activities, subject to minimum thresholds.

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Clause 12: Consideration to be taken into account for purposes of direction

This clause provides that a transition committee considering an application from a council for a disposal or a contract shall take into consideration any other disposals or contracts undertaken by the council from a date specified in a direction from the Department.

Clause 14: Statutory transition committees: constitution

This clause makes provision about the establishment of statutory transition committees to manage, at a local level, the transition from the current configuration of 26 local government districts to the new 11 districts as set out in the Local Government (Boundaries) Act (Northern Ireland) 2008. The clause also provides the Department with the power to specify in regulations the level of membership of the statutory transition committees, the process to be adopted by the current councils to determine their representation on the relevant transition committee, and the governance arrangements for the committees. It also provides for the regulations to make provision in relation to making payments to and facilities available to statutory transition committees.

Clause 15: Statutory transition committees: functions

This clause provides the Department with the power to specify in regulations the functions and powers of a statutory transition committee in relation to delivering the transition process. It is intended that the functions of a statutory transition committee will include the development and management of the convergence of the plans and programmes of the current local government districts that will form the new districts; the development of strategies for estates and accommodation; the management of the transfer of assets and liabilities; the development of a preliminary staff structure for the new council; the appointment of a Chief Executive designate and key senior managers designate, and the preparation of a budget and the fixing of the rate for the new council district.

Clause 16: Power to modify existing legislation

While clauses 14 and 15 set out specific provisions in relation to the making of regulations for the establishment and operation of statutory transition committees, this clause provides a power for the regulations to apply (with or without modification) or disapply the provisions of relevant local government or rating legislation.

Clause 17: Severance payments to councillors

The clause confers a power on the Department to make regulations providing for the making of severance payments to councillors who resign as councillors before the end

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of a specified period and who meet such other criteria as the Department may specify. The clause also amends section 4 of the Local Government Act (Northern Ireland) 1972 to provide that a person who has received a severance payment is disqualified from being elected, or being, a councillor.

Clause 18: Acquisition of land otherwise than by agreement

This clause provides that councils may vest land for any of their purposes in Part 2 of the Waste and Contaminated Land (Northern Ireland) Order 1997 – a provision that had been inadvertently omitted from that Order.

Clause 19: Application of certain provisions to certain joint committees constituted as bodies corporate

Northern Ireland councils have formed themselves into 3 joint committees (Waste Management Groups) to address waste management issues. Two of the joint committees have been constituted as bodies corporate by orders made by the Department. This clause amends those orders to apply certain provisions of the Bill to those bodies. The amendments will permit arc21 and SWaMP2008 to enter into certified contracts and vest land for waste management purposes.

Clause 20: Regulations and orders

This clause essentially sets out the means by which the Department may make different regulations as provided for in the Bill.

FINANCIAL EFFECTS OF THE BILL

21. The contracts provisions will not have any direct impact on public sector costs. They will, however, give confidence to the private sector concerning the powers of councils to enter into long-term service contracts and should enable councils to enter into contracts to improve the waste infrastructure in Northern Ireland.
22. The introduction of the controls regime does not place additional demands on public sector financial costs or manpower.
23. The cost of the statutory transition committees is estimated to be £1.5M to £2M per annum up until the new councils come into operation.
24. The cost of the severance payments to councillors will depend on the number of councillors who apply and meet the criteria to receive an award. The Department estimates that it could cost approximately £5.25m. The detail of the severance arrangements will be set out in the subordinate legislation and more detailed

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information about the costs of scheme, including whether the cost will be met by local or central government, will be available then.

HUMAN RIGHTS ISSUES

25. The Department believes that provisions in the Bill are compatible with the Human Rights Act 1998.

EQUALITY IMPACT ASSESSMENT

26. Under the terms of section 75 of the Northern Ireland Act 1998, the Department carried out screening for equality impact and is satisfied that the provisions in the Bill will not lead to discriminatory or negative differential impact on any of the section 75 groups.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

27. The Department did not complete a regulatory impact assessment in respect of provisions in the Bill as they do not give rise to any associated costs or savings on business, charities, social economy enterprises or the voluntary sector.

LEGISLATIVE COMPETENCE

28. The Minister for the Environment has made the following statement under section 9 of the Northern Ireland Act 1998:

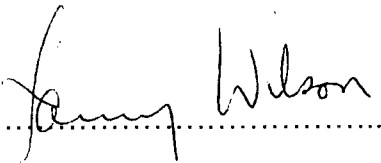
“In my view the Local Government (Miscellaneous Provisions) Bill would be within the legislative competence of the Northern Ireland Assembly.”

DEPARTMENT OF THE ENVIRONMENT

LEGISLATIVE COMPETENCE STATEMENT

LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) BILL

In my view, the Local Government (Miscellaneous Provisions) Bill would be within the legislative competence of the Northern Ireland Assembly.

Signed..........

Minster for Department of the Environment

Date.....11/06/2009.....